

**UNITED STATES COURT OF APPEALS**

**AUG 26 1997**

**TENTH CIRCUIT**

---

**PATRICK FISHER**  
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ANGELO DeHERRERA,

Defendant - Appellant.

No. 96-2122  
(D. Ct. No. CR-95-330-JC)  
(D. N. Mex.)

---

**ORDER AND JUDGMENT\***

---

Before TACHA, BALDOCK, and LUCERO, Circuit Judges.

---

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

This appeal is from an order of the district court sentencing defendant DeHerrera to a term of imprisonment of 135 months after a plea agreement in

---

\*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

which defendant pled guilty to Count V of a superseding indictment, which charged him with accessory after the fact to a carjacking resulting in death. The district court imposed the sentence within the applicable Sentencing Guideline range and refused to depart downward after a request for a downward departure by the United States.

Defendant DeHerrera appeals arguing that the district court should have granted a downward departure based upon U.S.S.G. § 3B1.2 arguing that the district judge should have granted defendant the downward departure because of his mitigating role in the underlying offense. The record makes clear that the district judge knew that he had the power to grant a downward departure.

Downward departures from applicable Sentencing Guideline ranges are left to the sound discretion of the trial court. It is well settled law in this circuit that absent a misunderstanding on the sentencing judge's part, illegality, or an incorrect application of the guidelines, we will not review the denial of a downward departure. United States v. Garcia, 919 F.2d 1478, 1481 (10th Cir. 1990). We **DISMISS** this appeal for lack of appellate jurisdiction.

ENTERED FOR THE COURT,

Deanell Reece Tacha  
Circuit Judge